THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA
DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

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HUSBAND AND WIFE—WIFE'S CRIMINAL LIABILITY—COERCION—HUSBAND'S PRESENCE. *State* v. *Miller*, 62 S. W. 692 Missouri, April 23, 1901. The case presents this state of facts: the wife, defendant in the action, procured a revolver and conveyed it to her husband who was confined in prison convicted of murder. She was indicted under a statute against conveying instruments of escape into prisons. Convicted, she appealed on the ground that she acted under the coercion of her husband and must therefore be exonerated.

This discussion will include notice of the nature, history and application of the doctrine under which this prisoner claimed the right to acquittal.

In its nature the legal principle is as simple as a statement of it, which may be made as follows: a wife acting in the presence of her husband is presumed to act under his coercion and cannot

be convicted of crime under such circumstances, unless the contrary be shown. The reason for the rule is found in the consistency of the law; for, having put upon the wife the duty of submitting her will to that of her husband, it cannot consistently do otherwise than presume the absence of criminal intent for her when in the presence of her husband's will, nor justly accuse her for fulfilling that legal duty.

In its history the doctrine is very ancient. Blackstone says that it is found in the laws of Ina, the West Saxon, which takes it back over 1,250 years. It has passed through several interesting phases in development. At first the presence of the husband seems to have been an absolute defence for the wife in all crimes. The first exceptions noted in the books are Somerville's case, I And. 104 (*circa* 1584), and Somerset's case, Stat. Trials, V. 1, Tr. 28 and 29 (1615). In the former both Somerville and his wife were attaint of treason, and in the latter the Earl and his wife were held guilty as accessories to murder. Perhaps from these cases treason and murder came to be considered exceptions to the rule. At any rate they were so recognized in Hale's time, 1 H. P. C. 45.

According to Lord Hale's opinion another change had also come into the doctrine. He considered that the presence of the husband was only a rebuttable presumption of coercion, not an absolute defence. 1 H. P. C. 516.

Blackstone speaks of the exception of the greater crimes to the general rule, but says nothing of its being considered other than an absolute defence. And in 1823 we find authority for the belief that it was then treated as an absolute defence. *Rex* v. *Knight,* 1 C. & P. 116, note.

The tendency has been away from that, however, and now it is the law generally that this presumption of coercion may be rebutted. *Reg.* v. *Torpey,* 12 Cox C. C. 45, *U. S.* v. *Terry,* 42 Fed. Rep. 317.

It is in the application of the principle that the difficulty lies, and it centres about the definition of the word "presence," for, although the authorities agree that neither the fact nor the presumption of coercion can be established without proof of the presence of the husband, some of them have strained the meaning of the word to the point where for all practical purposes it includes "absence." In general, however, it seems to be sufficient for the husband to be near enough to the wife at the time of the act for her to be under his immediate control or influence. Conolly's case, 2 Lewin C. C. 229, *State* v. *Fertig,* 98 Ia. 139; *Com.* v. *Flaherty,* 140 Mass. 454.

The present case exceeds all others observed in thus stretching the doctrine. The decision followed the case cited in the note to *Rex* v. *Knight* (*supra*), and the similarity of the fact seems to have outweighed a difference in the law. There the statute, 16

Geo. II, C. 31, made it a crime to convey an implement of escape into the jail and *deliver* it to the prisoner, but the Missouri statute, Rev. Stats. Mo. 1899, sec. 2061, makes it a crime to *convey* such an implement into the jail. In the former case the crime was completed in the presence of the husband and the decision may well stand, but in this case the criminal act was completed the instant the accused crossed the threshold of the prison with the instrument in her possession, when the husband, a convicted murderer in his cell, could not have been near enough to her to exert any control over her.

On this basis, it is submitted that the jury was right in its conclusion finding the wife to have acted independently of the husband, and that the case was therefore ill-considered.

T. M. P.

WITNESS—COMPETENCY.—*Dickerson* v. *Payne,* 48 Atl. 528. In this case, A. brought an action against B., administrator of C., deceased, to recover for services rendered to the intestate by the plaintiff as housekeeper and nurse. At the trial below the plaintiff, against the defendant's objection, had been allowed to testify that she rendered various services to the intestate personally because of his invalid condition. The Supreme Court of New Jersey held that this testimony was "in the main, illegal," and made the rule to show cause why a new trial should not be granted absolute.

The decision rests entirely upon the construction of the Act of February 25, 1880, of New Jersey (2 Gen. St., p. 1407), the section in controversy being as follows:

"That in all civil actions in any court of law or equity of this State, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action."

In construing this act the court in the case under discussion adopted the opinion of Mr. Justice Reed in *Smith* v. *Burnet,* 35 N. J. Eq. 314-322, in which he says, "It is apparent that the object of the Legislature is to be primarily regarded, and that that object is to close the mouth of a party whose interest is antagonistic to the estate of the deceased person in regard to those transactions and conversations in which the deceased bore a part, and concerning which he, if living, would be the most important —perhaps the only witness besides the opposing party." This gives us the spirit of the act, but in order to apply the principle here laid down it is necessary to determine the meaning of the phrase, "those transactions . . . in which the deceased bore a part."

In other words, the problem which presents itself is this: What must be the nature of the part taken by the deceased in the transaction in order to render the evidence of it inadmissable? An examination of the cases will show that the courts of New Jersey have held that acts done on behalf of the testator or intestate, but not in his preence, are not transactions with the deceased within the meaning of the act. Thus in *Provost* v. *Robinson,* 58 N. J. Law, 222, a suit was brought against the executor of the deceased by the plaintiff upon a contract entered into by the testator for the erection of certain buildings; and it was held that the plaintiff was competent to prove this work and expenditures in pursuance of the authority thus given.

Beasley, C. J. (in speaking of the act of 1880), said, "In its connection with the present case the inquiry arises with respect to the scope of the meaning of the phrase, 'any transaction with the testator,' etc. Manifestly the work and expenditures in question were transactions *for* the testator, but in what way were they transactions *with* him? He was not present when such acts were performed, nor did he by deed, word or *presence,* participate in their doing. Such matters the deceased was interested in, but they plainly were not transactions with him. The statute qualifies the party to be a witness in some respects in these cases, but if he is to be excluded from testifying with respect to the subjects here in question, it is difficult to see how his testimony could be in any case available; it would seem that he could testify only to transactions irrelevant to the issues. The statutory expression is indistinct, and must, therefore, be interpreted so as to effectuate the legislative purpose as indicated in the context, and that purpose was to incapacitate the living witness with respect to personal intercourse and conversation with the deceased." See also *Woolverton* v. *Van Syckel,* 57 N. J. Law, 395.

These cases although no direct authority for the proposition that the mere presence of the testator or intestate at the time of the doing of the act would be such a "participation" in it as to make evidence of it inadmissable, still they intimate that such would be the policy of the law. The decision in the present case is undoubtedly a close one, and it apparently would have been no strained construction to have said that these were "transactions for" the intestate but not "with him" so as to bring the case within the prohibition of the act. *D. H. Y.*